IN THE

Supreme Court of the United States

No. 584—October Term, 1940.

IN THE MATTER

of

The Petition of NEW YORK TANK BARGE CORPORATION, as chartered owner of the tank barge *T. N. No. 73*, for exoneration from or limitation of liability.

COMMERCIAL MOLASSES CORPORATION,
Petitioner,
(Claimant below)

vs.

NEW YORK TANK BARGE CORPORATION, as chartered owner of the tank barge *T. N. No. 73*,
Respondent,
(Petitioner below).

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR NEW YORK TANK BARGE CORPORATION IN OPPOSITION.

ROBERT S. ERSKINE,
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List of Cases Cited.

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Opinions Below.

The opinion of the District Court is not officially reported but is unofficially reported at 1939 A. M. C. 673, and is printed in the Record (R. 281). The opinion of the

Circuit Court of Appeals is officially reported at 114 F. (2d) 248, and is printed in the Record (R. 339).

Jurisdiction.

This is a proceeding in admiralty instituted by New York Tank Barge Corporation, as chartered owner of the tank barge *No. 73* (the petitioner in the District Court), for exoneration from or statutory limitation of liability for damages resulting from the sinking of the barge at Pier 1, Hoboken, New Jersey, on October 24th, 1937. The petitioner in this Court was the sole claimant below with respect to loss or damage of the barge's load of molasses, and is invoking the jurisdiction of this Court under Section 240 of the Judicial Code as amended by the Act of February 13th, 1925, 43 Stat. 938, 28 U. S. C. §347.

The Facts.

The petition and petitioner's brief herein do not contain an adequate statement of the facts to indicate the basis of the decisions below, and thereby fail to show the very simple question which is actually involved.

This is not a "common carrier" case. The steel tank barge *T. N. No. 73* was furnished by respondent* under a "private" contract of carriage (Ex. 6; R. 261), for harbor transportation of petitioner's molasses from alongside the S.S. *Athelsultan* at Pier 1, Hoboken, N. J., to destination at Baldwin Avenue, Weehawken, N. J. (R. 308).

Extended and uncontradicted testimony was offered and accepted by the trial judge that the barge was of the proper type and construction for the cargo; that she had been maintained in good condition by periodic drydockings and

* The parties are referred to by their titles in this Court.

repairs; that her proper maintenance was constantly supervised by experienced employees of respondent; that she had been drydocked and all necessary repairs had been made in May, 1937; that under ordinary circumstances no further drydocking was required in the interval of time to the date of the sinking; that the barge had carried a cargo of molasses a few days prior to October 23rd, 1937 without mishap, and that nothing had occurred in the interval to damage her; that when she went alongside the *Athelsultan* and before receiving any molasses she was inspected not only by respondent's assistant superintendent, but also by a representative of cargo interests, and was found to be clean, fit, and tight, with no leaks, cargo's representative admitting that the tanks "were dry and clean" (Fdgs. 10, 26; R. 308, 314; R. 37, 39, 65, 71, 174-176, 192, 197, 198, 228).

The barge commenced to receive the molasses at 9:05 P.M. on October 23rd, 1937, by means of the *Athelsultan's* pump and discharge hose (Fdg. 11; R. 308, 309). A competent and experienced master and mate were in charge of the barge, and after loading commenced the captain retired to his cabin, leaving the operations in charge of the mate (Fdgs. 12, 13; R. 309, 310).

With a heavy type of fluid cargo like molasses, a full load would be less than the cubic capacity of the barge's tanks (R. 100), and, without controversy, it is customary to judge a barge's full load (weight), by the final freeboard or height of the deck above the water (R. 37, 57; Fdg. 12, R. 309).

On this occasion, in accordance with the customary practice, the molasses was first taken into the barge's two forward tanks until the bow end of the barge was down to a freeboard of twenty-three inches, and then the forward valves were closed and the flow of molasses was started into

the two stern tanks (Fdgs. 12, 13, R. 309, 310). Under any combination of figures in the case, including those found by the trial judge (Fdg. 33, R. 317), the flow of molasses into the stern tanks was at a rate of from three to three and a half tons per minute, which, according to uncontradicted expert testimony, was causing a steady settling of the barge by the stern at a rate of nearly one inch per minute (R. 168).

When the mate observed that the stern of the barge was down to about three inches of the proper freeboard, he started forward to close the stern valves, but stopped on his way for a conversation with someone on the deck of the ship, and thereafter, as he continued towards the stern valves, he felt the barge settle by the stern. By the time he could call the captain from the cabin the stern deck was under water. During all that time the molasses was still flowing into the stern tanks, and before the stern valves could be closed the barge parted her stern mooring lines and sank by the stern. Subsequently she parted the forward mooring lines and went completely to the bottom (Fdgs. 15, 16, 18, 19; R. 310-312).

The diver who subsequently took part in the raising of the barge found no evidence of leakage when he examined the barge (Fdgs. 21, R. 312, 313).

After the barge had been raised and put on drydock, respondent's port superintendent and five experienced surveyors, including a representative of your petitioner's underwriters, examined the hull for the purpose of ascertaining the cause of the sinking, but were unable to determine it because they were unable to find any evidence of unseaworthiness or leakage to account for the sinking (Fdg. 23, R. 313; R. 81, 134, 138, 176, 226). The sides, ends, and bottom of the hull were tight, with the exception of

damage to bilge plates, which was obviously and admittedly due to the wire slings used in raising the barge after the accident (R. 81, 131-133, 137, 141, 226). That bilge-keel damage was in an area which would have been under water even when the barge was riding light, and was in the way of the cargo tanks, so that, as the barge had only a single "skin", if the damage had existed before loading there would have been a direct flow of water into the cargo tanks, which was negatived by the inspection of cargo's representative before loading commenced (R. 133, 141, 197, 210).

An experienced marine architect, having the dimensions of the barge and her tanks, was able to calculate her buoyancy and to show that the weight of molasses pumped into the stern tanks was from twenty-one to eighty-four tons in excess of the sinking point (R. 164-167; Ex. 9, R. 267), those figures representing the difference between the computations worked out by the expert on information available before trial and the corrected computations made by him after the trial on the figures furnished to him by the trial judge (R. 279-280).

The private contract between the parties for the carriage of the molasses (Ex. 6, R. 261) contained the following clause:

> "It is agreed that the * * * Molasses Corporation shall insure the cargoes carried by the New York Tank Barge Co., Inc., in its own, or chartered or operated barges, for the account of New York Tank Barge Co. Inc., and/or the owners of such barges; and that neither the New York Tank Barge Co. Inc., nor such barges shall be liable for any loss in respect of which insurance has been or could have been effected" (R. 263).*

* The trade name of your respondent, inadvertently used in the pleadings, was corrected at the trial to the proper corporate title, without objection (R. 31).

Your petitioner admitted by stipulation that it did not insure its cargo for the account of respondent and respondent's barge, but did insure for its own account, collected the insurance, and filed its claim in these proceedings on behalf of its underwriters (R. 182-185). Your petitioner did not offer any evidence that it could not have obtained insurance for account of your respondent and respondent's barge with respect to this loss.

The Proceedings Below.

In the District Court your respondent, as owner of the barge, did not deny negligence of its employees in the loading of the barge's stern tanks, but prayed for statutory limitation of liability on the ground that it had no privity or knowledge of the said negligence (R. 5, 6);* and at the opening of the trial, by an amendment made on due notice, asked that your petitioner's claim be dismissed because of your petitioner's failure to procure the agreed insurance, in breach of the provisions of the private contract of carriage quoted above (R. 31, 32)

Your petitioner alleged that the sinking of the *T. N. 73* was due to unseaworthiness (R. 11, 19, 344); and with respect to the contract, its contention is that its agreement

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* The pertinent portions of R. S. 4283 are: "The liability of the owner of any vessel, whether American or foreign, * * * for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, * * * exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

This Statute, like the Fire Statute (R. S. 4282), does not require the owner of a vessel to prove seaworthiness as a condition precedent. *Earle & Stoddard* v. *Wilson Line*, 287 U. S. 420, 425, 426; *The El Sol*, 72 F. (2d) 212; *The No. 84-H*, 296 Fed. 427; *The Rambler*, 290 Fed. 791, 792.

to procure insurance was not intended to apply to a loss resulting from unseaworthiness, although it admits that for any other cause of loss its breach of the contract would bar the claim. Your petitioner throughout the proceedings has attempted to obscure the plain proposition that it had the burden of proving the unseaworthiness on which it sought to excuse its breach of the contract.

At the trial, the petitioner did not offer a scintilla of evidence to support its allegation of unseaworthiness, but rested its contention on an inference which it sought to draw from the mere fact of the sinking.

After careful consideration of the record, the trial judge found that "the best that can be said of the state of the record is that the cause of the accident has been left in doubt" (R. 295; Con. 2, R. 324). It is plain from his opinion, which has been incorporated in the findings and conclusions, that he meant that he was unable to determine whether the barge sank from unseaworthiness, or from negligence in the loading of the stern tanks. In spite of that recognition of another known possible cause of the sinking, he concluded that he was bound to infer unseaworthiness (Con. 2, R. 324).*

The trial judge, however, concluded that the plain meaning of the insurance provisions of the contract included a loss due to unseaworthiness, and accordingly dismissed your petitioner's claim for its admitted breach of the contract, pointing out that the said contractual provisions were

* The trial judge apparently felt that he could not accept the proofs that the sinking was due to negligence in the loading of the stern tanks because of his inability to make the figures tally with arithmetical precision (Fdgs. 31-41, R. 316-321),—a test which would seem to go beyond all reasonable limits of proof in a case of this type in which arithmetical precision is always an impossibility.

not contrary to public policy in a contract of private carriage (R. 325-329).*

The Circuit Court of Appeals did not decide in favor of your petitioner's appeal from the Bench, as now seems to be suggested (Petition, p. 5), but found it unnecessary to consider the argumentative excuse of the breach because your petitioner had not sustained its burden of proving the unseaworthiness on which the excuse was based. The decree dismissing your petitioner's claim was accordingly affirmed (R. 339-435).

The Question Presented.

Thus, your petitioner's case involves solely the dismissal of its claim because of its breach of the contract by its admitted and unexplained failure to procure the promised insurance, and does not present the questions relating to a carrier's liability which your petitioner suggests.

The decisions of the lower courts on the question of your petitioner's breach of contract do not conflict with but are supported by established law. Your petitioner has cited only cases in which carriers, particularly common carriers, sought immunity from liability under the Harter Act or under bill of lading exceptions, where the carrier had the burden of proving seaworthiness as a condition precedent to the relief sought. The law of those cases with respect to a carrier's liability has no application to the question of your petitioner's breach of the private contract of carriage by its failure to procure insurance as agreed.

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* The trial judge denied your respondent's prayer for limitation of liability under the law peculiar to "personal" contracts (Con. 3, R. 324). In this brief, the limitation of liability question is not discussed, because it was not involved in the dismissal of your petitioner's claim and is not the issue now raised by your petitioner.

FIRST POINT.

YOUR PETITIONER'S CASE DOES NOT PRESENT THE QUESTIONS SUGGESTED BY IT.

The basic question is whether your petitioner can escape its admitted and unexplained breach of its contractual agreement to procure insurance for the account of your respondent and to release your respondent in the event of such a breach.

The trial judge rightly held that under the plain language of the contract (quoted, p. 5, *supra*), your petitioner's agreement to procure the insurance applied whether the loss was due to unseaworthiness or not (R. 325-329). The Circuit Court of Appeals did not indicate its disapproval of that decision (R. 345).

The said ruling is in accordance with the established law that a private carrier has complete freedom of contract, and may contract even against all liability. *Santa Fe* v. *Grant*, 228 U. S. 177, 185, 188; *The Sabine Sun*, 287 U. S. 291; *The Oceanica*, 170 Fed. 893; *The G. R. Crowe*, 294 Fed. 506, cert. denied, 264 U. S. 586; *Societa* v. *Federal Insurance Co.*, 62 F. (2d) 769; *New Haven Trap Rock Co.* v. *United States*, 15 F. Supp. 619, 620.

Under the language of the contract, your petitioner's agreement to procure the insurance was not limited to losses due to negligence other than unseaworthiness, but specifically related to "any loss" (R. 263). It was not an agreement to give to your respondent the "benefit" of your petitioner's insurance. It was a plain and affirmative undertaking by the petitioner to procure insurance for your respondent's account.

In holding that your petitioner's agreement related to loss due to "any cause", the decision of the trial judge in no way nullified the warranty of seaworthiness. If your petitioner had proven that the loss was due to unseaworthiness, and that it could not obtain the promised insurance for such loss, the warranty of seaworthiness would have remained in full force and effect. The suggestions in your petitioner's brief that it could not have obtained the insurance are wholly improper, in the absence of any proofs of an attempt to obtain it, or that it could not be obtained. Thus, the basic question decided in the District Court does not involve unseaworthiness and does not relate to a carrier's liability.

In an effort to escape from its breach of the contract as decided in the trial court, your petitioner argues, contrary to the plain language of the contract, that its agreement to procure insurance was not intended to cover losses due to unseaworthiness. Even if that argument were sound, (which your respondent denies,) your petitioner had to prove the alleged unseaworthiness.

It would seem almost elementary that a party who seeks to excuse his admitted non-performance of one of the terms of his contract has the burden of proving the facts on which he bases the excuse. *United Const. Co.* v. *Haverhill*, 22 F. (2d) 256, 259.

Moreover, a private carrier has not the responsibilities of a common carrier, but is liable, as a bailee, only for negligence; and the burden of proof remains on the bailor when all the evidence is in. *Southern Ry.* v. *Prescott*, 240 U. S. 632, 640; *The Lyra*, 255 Fed. 667; *Kohlsaat* v. *Parkersburg*, 266 Fed. 283; *Alpine Forwarding Co.* v. *Pennsylvania R. R. Co.* 60 F. (2d) 734; *The Norden*, 6 F. (2d) 883, 886; *The C. R. Sheffer*, 249 Fed. 600; *The Rokeby*, 202 Fed. 322.

For those reasons, your petitioner had the burden of proving the alleged unseaworthiness, and failed in that burden when the trial judge concluded that the cause of the sinking had been left in doubt.

That that was the view of the Circuit Court of Appeals seems clear from the following language:

> "In the case at bar, the Barge Company was acting as a private carrier and was therefore only a bailee; it is well settled that the burden rests upon the bailor to prove some breach of duty by the bailee other than his mere failure to return. * * * The Molasses Company acknowledged this by alleging in its claim that the barge was unseaworthy; it was obliged to do so; and, having done so, it had to persuade the judge or fail.
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> "Since therefore we think that the claimant did not prove its case, even if the clause in the charter regarding insurance did not cancel the warranty of seaworthiness, it is not necessary to pass upon that question" (R. 344-345).

In an indirect way, in finding that your petitioner had not sustained its burden of proving unseaworthiness, the Circuit Court of Appeals recognized the oft-stated principle of law that an inference of unseaworthiness stands only so long as no other known possible cause of the loss is disclosed by the proofs. *The Transit*, 250 Fed. 71, 72; *The City of Camden*, 292 Fed. 93, 96; *In re Eastern Transp. Co.*, 37 F. (2d) 355, 358; *Pacific Coast SS Co.* v. *Bancroft-Whitney*, 94 Fed. 180, 196; *Sanbern* v. *Wright and Cobb*, 171 Fed. 449, 453.

That rule is well illustrated by two decisions in the Third Circuit, *The Transit*, 250 Fed. 71, 72, and *Loveland* v.

Bethlehem Steel Co., 33 F. (2d) 655, which, when read together, show that on a factual basis the decision of the Circuit Court of Appeals herein is not in conflict with the rule in the Third Circuit as petitioner seeks to argue (Petitioner's brief, p. 18).

Your petitioner has not cited any case in conflict with the decisions below with respect to the question which the lower courts decided herein in dismissing your petitioner's claim.

The petition and petitioner's brief cite and make lengthy quotations from earlier cases in which carriers, particularly common carriers, were attempting to escape liability under the Harter Act, or under bill of lading exceptions. In such cases the carrier had the burden of proving seaworthiness as a condition precedent to the relief sought. The Circuit Court of Appeals commented on that distinction in its opinion herein (R. 344-345). But the law of those cases as cited by your petitioner does not apply here, for the simple reason that the same issues are not involved. The dismissal of your petitioner's claim in no way involves a carrier's liability, but turns solely upon your petitioner's breach of its undertaking in the private contract of carriage.

SECOND POINT.

THE CASE HAS NONE OF THE IMPORTANCE WHICH YOUR PETITIONER SUGGESTS.

For the reasons stated above, the decisions of the lower courts are not in conflict with earlier decisions.

The case is also not of any peculiar importance to business interests of the maritime world, because it turns on

the specific provisions of a private contract of carriage. The parties themselves are fully able to correct the situation, if it needs any correction, in the drawing of future contracts.

CONCLUSION.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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Dated New York: December 5th, 1940.